

**Legal Expert Group -  
Established by the First Global Soil Week**

**DISCUSSION PAPER**

**on**

**Options for a regulatory mechanism under the UNCCD for land degradation neutrality and the sustainable use, management and protection of soils and their functions**

**1) Introduction**

The crucial role of soils for sustainable development has received increased attention at a political level in recent years. Key activities were the Berlin Call for Action of September 2011,<sup>1</sup> the first Global Soil Week which took place in November 2012 in Berlin and will continue on an annual basis.<sup>2</sup>

In that regard, the conclusions drawn at the Rio+20 Conference in June 2012 and the events that followed are of eminent importance.

The Rio+20 Outcome Document<sup>3</sup>, endorsed by representatives of the world's states "recognizes the need for urgent action to reverse land degradation" and notes further that "in view of this, we will strive to achieve a land degradation neutral world in the context of sustainable development".<sup>4</sup>

In this regard, the objective of a "Land Degradation Neutral World" has received wide political support. The statements of various states, including China, Benin on behalf of the least developed countries, Group 77 and others in the subsequent discussions of the "Sustainable Development Goal – Open Working Group" in New York in May 2013 underline this commitment.

In the 10-Year Strategy of the UNCCD (2008-2018) that was adopted in 2007,<sup>5</sup> Parties to the Convention further specified their goals: "to forge a global partnership to reverse and prevent desertifica-

---

<sup>1</sup> Culminating with the Berlin Common Statement "*Protecting soils for our Common Future: A call for action*", of September 2011.

<sup>2</sup> See [globalsoilweek.org](http://globalsoilweek.org)

<sup>3</sup> See <http://www.unccd2012.org/futurewewant.html>

<sup>4</sup> The UNCCD Secretariat *Policy Brief* for Rio+20, May 2012 page 10, defines the concept as: "Land degradation neutrality is achieved when globally or in a given landscape or terrestrial ecosystem the area of productive land (and therefore sustainable land use) remains stable or increases".

<sup>5</sup> Decision 3/COP.8 of UNCCD Conference of the Parties 2007

tion/land degradation and to mitigate the effects of drought in affected areas in order to support poverty reduction and environmental sustainability".

Consequently, there is a strong political momentum for international actions for land degradation neutrality and for the sustainable use, management and protection of soils and their functions.

A Legal Expert Group (LEG) was formed as a result of discussions held at the first Global Soil Week (<http://globalsoilweek.org/>) in November 2012. The LEG is chaired by the German Federal Environment Agency and the European Commission and consists of 15 Legal Experts from different regions, organizations and institutions and various professional backgrounds. The mandate of the LEG as established by the Global Soil Week was to analyze options for a regulatory mechanism to address land degradation neutrality and the sustainable use, management and protection of soils and their functions. The LEG communicated by correspondence and held a two day meeting at Potsdam, Germany in June 2013.

## **2) Political arguments for a regulatory mechanism under UNCCD**

The sustainable use, management and protection of soils and their functions are a prerequisite for water, food and energy security and for the realization of the human rights to adequate food and water and in general for sustainable development. Land degradation neutrality is broader than this basic approach because it refers to land rather than to just soils, but in its essence it has the same objectives. The sustainable use, management and protection of soils and their functions, as well as achievement of land degradation neutrality, needs also to take into consideration the governance of tenure of land as an essential element and as a precondition of poverty eradication. In order to take the human welfare at the centre of the approach, all social, economic and human right implications must be taken into account.

For the time being, significant political momentum for international action in that regard is apparent.

A regulatory mechanism on land degradation neutrality and on the sustainable use, management and protection of soils and their functions would create an obligation for the parties of that regulatory mechanism to comply with these objectives and establish a coordinated and agreed approach as to how these objectives could be achieved.

The UNCCD's fundamental mandate is to deal with desertification, land degradation and drought. UNCCD has strongly engaged itself with respect to land degradation, recently with its Ten Year Strategy (2008-18) of 2007 and during the preparation, conduct and follow-up of the conference Rio 20+ in June 2012. On these grounds, the UNCCD would appear to be the most appropriate international agreement to be the vehicle for such a regulatory mechanism.<sup>6</sup>

---

<sup>6</sup> Although there might be other international regimes suitable to include such a regulatory mechanism for land degradation neutrality and of the sustainable use and management of soils and their functions, the UNCCD is the most favored due to its mandate, tradition and its engagement in global land and soil issues.

### **3) Various options for a regulatory mechanism under UNCCD**

There are a number of options available to put in place such a regulatory mechanism under the UNCCD. Each option would have strengths and weaknesses which have to be analyzed from a legal perspective, as well as taking into account the institutional consequences and the political will of the Parties.

A longer-term approach would be an additional protocol to the Convention. Given that the Convention does not contain a provision which allows for the creation of a specific protocol, the question of whether such a protocol would first require an amendment to UNCCD needs to be clarified. However international law includes precedents where under an existing regime a protocol has been negotiated and approved without such an enabling provision.

A protocol would be a new international treaty under the umbrella of the UNCCD. Whether a protocol would have to be in line with the scope of the UNCCD or whether it could define its own scope of application would still need to be clarified.

An alternative approach would be to adopt a general Annex to the Convention on land degradation neutrality and on the sustainable use, management and protection of soils and their functions. So far, five regional annexes have been created under the Convention to assist with its implementation in the respective regions. However, Article 31. 2 of the UNCCD makes provision for an “annex, other than an additional regional annex”, which paves the way for a more general annex in addition to *regional* land degradation and desertification issues. The procedural conditions under which an annex – either regional or thematic in nature – has to be adopted are specified in Article 30 of the Convention. Under Article 30. 2 of the UNCCD, every effort should be made to reach agreement by consensus. If all efforts fail the annex could be adopted by a two-thirds majority of the Parties present and voting.

Such an annex would become an integral part of the Convention. Since the procedural requirements are relatively straightforward, a general annex on land degradation neutrality and on the sustainable use and management as well as the protection of soils and their functions could be considered as a more realistic option in view of the need to ensure concrete outcomes in the near future.

However, the scope of each annex under the Convention is limited to the scope of application of the Convention, e.g. to combat desertification in “affected areas” as specified in Article 1 of the Convention.

### **4) Possible regulatory instruments of such a regulatory mechanism**

Under the rules of international law, the proposed regulatory mechanism can only oblige states, but not citizens. The principles and provisions of international environmental law relevant to a regulatory mechanism for land degradation neutrality and of the sustainable use, management and protection of soils and their functions would be taken into account when drafting the mechanism.

It would be recommended that a text with clear and unambiguous legal rights and obligations should be drafted. Clarity and brevity are essential, not least to speed up the negotiation process. The following criteria have to be taken into account for the design of the provisions of a new general Annex.

They have to be *flexible* in order to be adaptable to the various different environmental and economic circumstances and political realities of each country. Moreover they have to be *precise* in order to have a regulatory effect. One benchmark for effectiveness could be that *compliance* could be checked in a respective procedure.

The proposed regulatory mechanism should be based on internationally agreed principles of environmental law, *inter alia*: the principle of sustainable development, the precautionary principle and a preventive approach, the polluter pays principle as well as the principle of “common, but differentiated responsibilities”. It should oblige Parties to achieve a high level of protection. It should at the same time be based on other essential principles of international law, such as human rights standards.

The regulatory mechanism must address both the objective of land degradation neutrality and the objective of the sustainable use, management and protection of soils and their functions. For the objective of land degradation neutrality, it is essential firstly to reduce the rate of land degradation and secondly to increase the rate of land restoration.

The following measures, for example, could form the basis of an additional new annex under the Convention to be implemented by Parties to the Convention as part of their national policies. However, the suitability and feasibility of such measures will require more detailed analysis when considering the structure and functions of a new additional annex:

- National action programs;
- Soil-related planning instruments, such as spatial planning;
- Prohibitions of extremely harmful substances to land and soil;
- Permission regimes for certain potentially harmful uses;
- Precautionary measures;
- Guidelines for preparing national soil legislation;
- Information gathering, awareness raising, public participation;
- Institutional arrangements;
- Technical cooperation;
- Reporting;

## 5) Summary and outlook

The paper is summarized as follows:

- A regulatory mechanism on land degradation neutrality and of the sustainable use, management and protection of soils and their functions is urgently needed and would support the achievement of water, food and energy security and foster sustainable development. It would also strengthen efforts to eradicate poverty.
- The mandate and tradition of the UNCCD and its engagement in global issues concerning land degradation and desertification place it in a unique position to establish a regulatory mechanism on land degradation neutrality and on the sustainable use, management and protection of soils and their functions.
- Two main options are available to establish a regulatory mechanism under the UNCCD. First, a comprehensive protocol to the Convention on land degradation neutrality and of the sus-

tainable use and management as well as the protection of soils should be considered as a longer-term option. Such a protocol could contain all the procedures necessary to achieve land degradation neutrality and of the sustainable use and management as well as the protection of soils with a wide scope of application. A second option would be the development of a thematic annex under Articles 30 and 31 of the Convention, as an integral part of the UNCCD. This would have to be consistent with the existing scope of the Convention.

- In order to give the regulatory mechanism a real and measurable effect, clear obligations and rights of the Parties are required. Internationally agreed principles of environmental law should be observed. The regulatory mechanism could include a variety of instruments.

There is a need for the Legal Experts to further discuss the strengths and weaknesses of the various approaches identified for a regulatory mechanism under the UNCCD, in particular the contents and structure of an instrument.